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Supreme Court, U.S.
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No. 04 305

In The

Supreme Court of the United States

PRE-PAID LEGAL SERVICES, INC., et al.,

Petitioners,

v.

SAMUEL BATTLE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Mississippi

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Under the Federal Arbitration Act and common law, may a state court impose unique requirements on either the interpretation or enforceability of a contractual agreement to arbitrate disputes which are not otherwise required of contracts under state law?

2. Does the Federal Arbitration Act preempt a state court requirement that an agreement to arbitrate disputes be balanced against a state constitutional preference for jury trials?

LIST OF PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The following persons were parties to the proceeding in the Supreme Court of the State of Mississippi, whose judgment is sought to be reviewed:

Plaintiffs:

Samuel Battle
Reginald Burks
Myrtis Hollis
James Robinson
Bennie Irvin
Mary Keeler
Willie McKenny
Renata L. Miller
David Mills
Eric Norwood
Geneva Shelby
Shemekia Shelby
Pastella Spratley
George Williams
Leonard Boddie
John C. Burwell
Angela Hudnall
Minnie Mosely
Caroline Smith
Thelma Louise Smith
Jimmy Grant
Sylvia Grant
Tony Barfield
Mary Honeysuckle
Lonedell Nicholson
Patricia Whitfield
Charles Alexander and
Beverly Thompson

LIST OF PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT – Continued

DEFENDANTS:

Pre-Paid Legal Services, Inc.,
Harland C. Stonecipher,
Brooks Werkheiser,
Dyre Law Firm, PLLC, and
Arnold Dyre

Pre-Paid Legal Services, Inc. is a publicly traded corporation and has no parent or publicly held company that owns ten percent or more of its stock.

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OPINION BELOW

As of this writing, the opinion of the Mississippi Supreme Court has not been released for publication in an official reporter. It is, however, reported at 2004 WL 636292, and has been reprinted in the Appendix at App. 1-12. The Supreme Court issued no opinion in connection with its denial of Petitioners' Motion for Rehearing. The one page order denying that motion has been reprinted in the Appendix at App. 17. Trial court opinions are not reported in Mississippi. A copy of the trial court's opinion is reprinted in the Appendix at App. 13-16.

JURISDICTION

The Mississippi Supreme Court handed down its decision on April 1, 2004, and entered an order denying Petitioners' motion for rehearing on June 3, 2004. This Court has jurisdiction under 28 U.S.C. § 1257 to review the Mississippi Supreme Court's decision on a writ of certiorari, in that the Mississippi Supreme Court's opinion denied petitioner's rights under the Federal Arbitration Act in a way that is directly contrary to prior decisions of this Court.

STATUTORY PROVISION INVOLVED

9 U.S.C. § 2

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the

whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

The Mississippi Supreme Court affirmed a summary judgment granted by the Circuit Court of Hinds County, Mississippi to the effect that Respondents had no obligation to arbitrate their disputes with Petitioners, despite the fact that the dispute was directly related to a contract which contained an arbitration clause.

This case involves allegations by Respondents (plaintiffs below) that they were induced to enter into pre-paid legal expense contracts by misrepresentations concerning the coverage offered by the contracts. Each of the Petitioners (defendants below) was charged with involvement in the formulation and/or implementation of a marketing scheme devised to mislead.

Respondents entered into pre-paid legal expense contracts with National Pre-Paid Legal Services of Mississippi, Inc. ("NPPLSM"), a wholly owned subsidiary of Pre-Paid Legal Services of Florida, Inc., which in turn is a wholly owned subsidiary of Petitioner Pre-Paid Legal Services, Inc. ("PPLS"). Petitioner Harland Stonecipher is president of PPLS and a member of NPPLSM's board of directors. Petitioner Brooks Werkheiser was a regional officer for PPLS and a sales associate licensed to sell in Mississippi as an agent of NPPLSM. Petitioner Dyre Law Firm was the firm under contract to provide the legal

services afforded by the NPPLSM legal expense contracts and petitioner Arnold Dyre was the senior attorney in that firm.

Each of the contracts entered into by the Respondents contained General Provision K, which states:

> **Settlement of Disputes**: In the event of a dispute, the parties will agree on an impartial attorney who will decide such dispute and that decision will be binding on all parties to such dispute.

By contract and course of dealing, PPLS provides administrative and other services for NPPLSM. Among other things, PPLS enters into independent contractor agreements with sales associates who will sell the NPPLSM contracts. By statute, Mississippi requires that both the company issuing the contracts in Mississippi and its sales associates be licensed by the Mississippi Department of Insurance. The license applications of sales associates are sponsored by NPPLSM, and if their applications are approved, they are licensed as agents of NPPLSM. NPPLSM is also licensed by the Mississippi Department of Insurance to issue pre-paid legal expense contracts in Mississippi, although it is not licensed as an insurance company.[1]

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[1] Although the state legislature has assigned responsibility for monitoring the sale of legal expense contracts to the Department of Insurance, the contracts at issue in this case are not insurance contracts under Mississippi law, because they are not indemnity contracts. *See* Miss. Code Ann. § 83-5-5 ("A contract of insurance is an agreement by which one party . . . promises to pay . . . upon the destruction, loss, or injury of something in which the assured or other party has an interest, as an indemnity therefor.").

The contracts are sold in much the same manner as insurance contracts – in one-on-one meetings with prospective members and in group settings at workplaces. The sales associate makes a presentation explaining the benefits offered by the contracts and answering the prospect's questions about coverage. If the prospect is interested, he or she completes an application, which is sent in to the company. If the application is approved, PPLS employees mail the NPPLSM contract to the Mississippi resident applicant.

NPPLSM was named a defendant in the original complaint filed in this case. However, upon discovering Provision K, attorneys for the Respondents quickly amended their complaint to eliminate NPPLSM as a defendant, drop all breach of contract allegations, and add a request for declaratory judgment that Respondents had no contractual or other obligation to arbitrate with any of the Petitioners.

After NPPLSM was no longer a party to the suit, Respondents sought declaratory judgment by motion for summary judgment. Respondents presented no evidence that they had not agreed to arbitrate. Instead, they argued that because none of them had entered into a contract with any of the remaining Defendants, they had no duty to arbitrate with them. Petitioners replied that because Respondents were alleging that a scheme to defraud had been concocted and implemented by NPPLSM's parent, a member of NPPLSM's board of directors, a sales associate licensed in Mississippi as an agent of NPPLSM, and the law firm which was under contract to provide the legal services offered under the contracts issued by NPPLSM, and then carried out by other sales associates who were also licensed as agents of NPPLSM, all for the purpose of

selling NPPLSM's contracts, Petitioners had standing to compel arbitration pursuant to General Provision K in those NPPLSM contracts, even though none of them was a party to those contracts, under such authorities as *J. J. Ryan & Sons v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320 (4th Cir. 1988); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (11th Cir. 1993); and *Westmoreland v. Sadoux*, 299 F.3d 462 (5th Cir. 2002).

The trial court granted Respondents' motion for summary judgment, finding there was no enforceable arbitration clause between Respondents and Petitioners (once NPPLSM was no longer a party to the suit).[2] The issues on appeal, as framed and briefed by the parties were whether Petitioners had standing to enforce the arbitration clause, given that they were not parties to the contract; and whether Respondents were bound by the arbitration provision because they continued to pay monthly membership fees and to avail themselves of the benefits of the contracts for months or even years after they received the contracts in the mail.

The Mississippi Supreme Court affirmed the trial court's ruling by opinion handed down on April 1, 2004. That court addressed neither of the issues raised by the parties, holding instead that General Provision K in the NPPLSM contract was not a valid, binding arbitration

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[2] The trial court's opinion is replete with factual errors, the most significant being her understanding that the Respondents had entered into a contract with petitioner PPLS, which did not contain an arbitration clause, and another contract with NPPLSM, which did contain an arbitration clause, and that PPLS was arguing for arbitration under the NPPLSM contract when it had failed to include one in its own contract with Respondents. There was no contract of any kind between Respondents and PPLS.

clause to begin with. In reaching that conclusion, the court (i) held that the intent of the parties had to be balanced against the Mississippi Constitution's guarantee of a right to trial by jury; (ii) imposed a requirement that either the parties sign the contract containing the arbitration provision or that a document relating to the contract signed by the parties contain a warning that there is an arbitration clause in the contract; (iii) placed the burden on Petitioners to prove that an agreement was made, even though the Respondents moved for summary judgment and presented no evidence that they had not agreed to the inclusion of Provision K in the contract; (iv) refused to apply standard rules of contract construction; and (v) refused to apply principles of estoppel and ratification to the issue whether plaintiffs were bound by the arbitration provision, even though those theories have been applied routinely to such issues when contracts other than arbitration agreement were at issue.

Neither the trial court nor the Mississippi Supreme Court decided whether Petitioners had standing to compel arbitration under the NPPLSM contracts.

Petitioners filed a Motion for Rehearing, pointing out that each of the reasons given by the court for its ultimate holding was directly contrary to the FAA and decisions of the United States Supreme Court. That motion was denied without comment on June 3, 2004.

REASONS FOR GRANTING THE PETITION

A. The Mississippi Supreme Court Imposed Additional Unique Requirements On Arbitration Clauses Not Otherwise Imposed On Contracts In Violation Of The Federal Arbitration Act And This Court's Opinions.

If the decision of the Mississippi Supreme Court in this case is allowed to stand and is followed by other state courts, the Federal Arbitration Act ("FAA") and the entire body of federal common law of arbitration would be rendered meaningless in state courts. The Mississippi Supreme Court has evaded numerous opinions of this and other federal courts by making such issues as an alleged lack of notice of the existence of the arbitration provision and the alleged complexity of the language of the dispute resolution provision grounds for determining that the provision was not an arbitration agreement at all.

The decision of Mississippi's highest court exemplifies its continued animosity toward arbitration clauses and is in direct conflict with numerous decisions of this Court. The Mississippi Supreme Court meandered around the question whether there was proof of an agreement to arbitrate, but ultimately based its ruling on the holding that "there was not a valid, binding arbitration agreement contained in the pre-paid legal expense agreement," even though the contract contained the following language:

> **Settlement of Disputes**: In the event of a dispute, the parties will agree on an impartial attorney who will decide such dispute and that decision will be binding on all parties to such dispute.

1. The Mississippi Supreme Court imposed a notice requirement on arbitration clauses that is not imposed on any other contract terms.

In construing the quoted provision, the Mississippi Supreme Court considered the fact that the Plaintiffs signed only an application for a pre-paid legal expense contract and the application contained no warning that the contract itself contained an arbitration clause – effectively imposing a new road block to any such agreement to arbitrate. As this Court has repeatedly held, a state may not set up impediments to the enforceability of arbitration clauses that are not imposed on contracts in general. *Southland Corp. v. Keating*, 465 U.S. 1 (1984). This Court has specifically held that the FAA preempted a state law that invalidated arbitration provisions unless the contract containing the clause stated in bold print on its front page that the arbitration provision was present. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996). The Mississippi Supreme Court attempted to evade the import of the *Casarotto* decision by using the application's failure to give notice that the contract called for arbitration as evidence that Provision K was not intended to be an arbitration provision. Such a rule of contract construction had never been announced prior to the decision in this case and has certainly never been applied to any contract provision other than the arbitration clause in this case. In other words, other than the *Battle* decision at issue here, there is no reported decision in which a Mississippi court has held that a contract term should or even could be read as expressing an intention other than that captured by its plain language merely because the party seeking to enforce that term had not given express notice to the other party that the term was part of the contract.

Alternatively, the Mississippi Supreme Court has used the lack of notice in the application as evidence of the absence of the plaintiffs' agreement to arbitrate. However such a decision also is directly contrary to *Casarotto*. In that case, the Montana Supreme Court had used precisely the same reasoning in upholding the statutory notice requirement, stating that the requirement "did not preclude arbitration agreements altogether, [but] simply prescribed 'that before arbitration agreements are enforceable, they be entered knowingly.'" *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 685 (1996) (quoting *Casarotto v. Lombardi*, 268 Mont. 369, 381, 886 P.2d 931, 939 (Mont. 1994)). This Court held that regardless of the rationale behind the requirement, it ran afoul of Section 2 of the FAA, because it set up a "special notice requirement not applicable to contracts generally." *Casarotto*, 517 U.S. at 687.

There is no rule of evidence that Mississippi courts apply to contracts generally which mandates that a court find that there has been no agreement to a particular contract term unless a contracting party was given some kind of prior written notice of the presence of the disputed term in the contract. The pre-paid legal expense contracts at issue in this case are sold much like insurance policies are sold; i.e., the applicant often does not see a copy of the contract until after completing the application and sending it and a first month's fee to the company. If the application is accepted, a copy of the contract is then mailed to the applicant. There is no case on the books in which the Mississippi Supreme Court has struck down a provision in an insurance policy because the application did not contain a notice that the provision was in the policy. Contrary to Section 2 of the FAA and this Court's decisions, the Mississippi Supreme Court has singled out the arbitration

provisions in the contracts at issue here for that novel treatment.

2. The Mississippi Supreme Court imposed a signature requirement on the enforceability of arbitration provisions that is not imposed on other contracts under the same circumstances.

In reaching its ultimate holding that Provision K was not an agreement to arbitrate, the Mississippi Supreme Court also relied on the fact that the Plaintiffs did not sign the pre-paid legal expense contracts. In doing so, the Mississippi Supreme Court created another special rule for arbitration clauses, not otherwise required of contracts in general. In Mississippi a contract need not be signed to be enforceable; therefore the Mississippi Supreme Court's ruling that an arbitration clause requires a signature to show agreement is directly contrary to the decisions of this Court in *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Perry v. Thomas*, 482 U.S. 483 (1987); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); and *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996).

The Mississippi rule applied to contracts generally is that a signature is usually sufficient to prove agreement to a contract's terms, but is not necessary. Where the contract is not signed, agreement may be proven by, *inter alia*, ratification or estoppel. "The object of a signature is to show mutuality or assent, but these facts may be shown in other ways, as, for example, by the acts or conduct of the parties." *Turney v. Marion County Bd. of Educ.*, 481 So.2d 770, 774 (Miss. 1985). On this point, *see also McInnis v. Southeastern Automatic Sprinkler Co.*, 233 So.2d 219, 221 (Miss. 1970) (signature not required where parties acted

upon terms of contract "exactly as if it had been executed with all formality"). Two long-established rules in Mississippi are at issue here. First, once a contracting party receives a copy of the contract, she is charged with knowledge of all of its terms whether she ever reads the contract or not. *Cherry v. Anthony, Gibbs, Sage,* 501 So.2d 416, 419 (Miss. 1987) second, once charged with even constructive knowledge of the terms of the contract, if the party avails herself of the benefits of the contract or otherwise treats the contract as valid and subsisting, such as by making payments called for in the contract, she has ratified all of the contract's terms. *Edwards v. Wurster Oil Co.,* 688 So.2d 772, 776 (Miss. 1997) (citing *Turner v. Wakefield*, 481 So.2d 846, 848-49 (Miss. 1985)); *Crabb v. Wilkinson*, 202 Miss. 274, 32 So.2d 356 (1947); and *Koenig v. Calcote*, 199 Miss. 435, 25 So.2d 763 (1947); and *Heritage Cablevision v. New Albany Elec. Power System*, 646 So.2d 1305, 1310 (Miss. 1994).

Although the pleadings before the Mississippi Supreme Court made it obvious that Respondents continued to take advantage of the benefits offered by the pre-paid legal expense contracts and to make monthly payments for months, or even years, after they received the contracts in the mail, that Court gave no reason why theories of estoppel and/or ratification did not apply to bind Respondents to the arbitration clauses.

3. The Mississippi Supreme Court also refused to apply rules which apply to the construction of contracts generally to interpretation of Provision K.

The Mississippi Supreme Court's failure to apply generally accepted rules of contract construction was equally as prejudicial to defendants' right to arbitrate as

was that court's application of rules that do not apply to contracts generally. Under Mississippi law, the first key to discerning the intent of the parties is the language of the contract. *Warwick v. Gautier Utility Dist.*, 738 So.2d 212, 215 (Miss. 1999). The language could not be any clearer in this case. The contract calls for the submission of any dispute to an impartial attorney chosen by the parties for binding resolution. There is nothing ambiguous about Provision K. Any person reading this provision would have known that disputes were going to be resolved by a single attorney, not in litigation.

The court also ignored another standard rule of contract construction – that contracts must be construed as a whole, giving meaning to all provisions. *Glantz Contracting Co. v. General Electric Co.*, 379 So.2d 912, 917 (Miss. 1980); *Warwick v. Gautier Utility Dist.*, 738 So.2d 212, 215 (Miss. 1999). The Mississippi Supreme Court held that Provision K was not an arbitration provision, but never once said what it meant. Instead, the court read the provision completely out of the contract. By failing to apply standard rules of contract construction, but instead, reading Provision K with a bias in favor of trial by jury, the Mississippi Supreme Court has violated the spirit and letter of Section 2 of the FAA and of every decision of this Court interpreting the Act.

B. The Mississippi Supreme Court's Ruling That The Right To A Jury Trial Can Trump The Parties' Intent To Arbitrate Deprives Petitioners Of The Protections Of Section 2 Of The FAA.

On its way to reaching the conclusion that the prepaid legal expense contracts contained no arbitration provision, the Mississippi Supreme Court engaged in what

it called balancing the intent of the parties against the right to a jury trial under Mississippi's Constitution. The application of this balancing test is directly contrary to two distinct but related aspects of the federal law of arbitration which has evolved since the adoption of the FAA. First, as this Court has held, in determining whether the parties made a valid arbitration agreement, state law may be applied only "*if* that law arose to govern issues of the validity, revocability, and enforceability of contracts generally . . . ." *Casarotto*, 517 U.S. at 686-87. By applying a provision of the Mississippi Constitution guaranteeing the inviolability of the right to a jury trial to invalidate an arbitration agreement, the Mississippi Supreme Court adopted a rule that can only apply to arbitration agreements and that is, therefore, directly contrary to this Court's holding in *Casarotto*.

Also, this Court has held that in interpreting arbitration agreements, "as with any other contract, the parties intentions control, but those intentions are generously construed as to issues of arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626 (1985). Rather than following this clear precedent, the Mississippi Supreme Court has gone one-hundred-eighty degrees in the opposite direction by proclaiming that the intent of the parties is to be read against arbitration and in favor of the right to a jury trial.

CONCLUSION

This Court should grant this Petition for Writ of Certiorari to insure that state courts follow the FAA and the body of federal common law arising from that Act

rather than dance around the FAA's pre-emptive effect on rules that bar enforceability of arbitration provisions by employing those same discriminatory rules to hold that the FAA does not apply because there was no agreement to arbitrate in the first place; that they must apply to arbitration agreements contract rules which preserve enforceability to the same extent that those rules are applied to other contracts; and that they do not use state constitutional provisions having nothing to do with contracts generally to trump the FAA's provision that arbitration agreements are to be treated as "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Respectfully submitted,

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IN THE SUPREME COURT OF MISSISSIPPI

NO. 2002-CA-01669-SCT

PRE-PAID LEGAL SERVICES, INC., BROOKS WERKHEISER, DYRE LAW FIRM, PLLC AND ARNOLD D. DYRE

v.

SAMUEL BATTLE, REGINALD BURKS, MYRTIS HOLLIS, JAMES ROBINSON, BENNIE IRVIN, MARY KEELER, WILLIE McKENNY, RENATA L. MILLER, DAVID MILLS, ERIC NORWOOD, GENEVA SHELBY, SHEMEKIA SHELBY, PASTELLA SPRATLEY, GEORGE WILLIAMS, LEONARD BODDIE, JOHN C. BURWELL, ANGELA HUDNALL, MINNIE MOSELY, CAROLINE SMITH, THELMA LOUISE SMITH, JIMMY GRANT, SYLVIA GRANT, TONY BARFIELD, MARY HONEYSUCKLE, LONEDELL NICHOLSON, PATRICIA WHITFIELD, CHARLES ALEX-ANDER, KENNETH M. CROOK AND BEVERLY THOMPSON

DATE OF JUDGMENT:	08/19/2002
TRIAL JUDGE:	HON. TOMIE T. GREEN
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
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J. BRAD PIGOTT

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BARRY W. GILMER

NATURE OF THE CASE: CIVIL – CONTRACT
DISPOSITION: AFFIRMED AND REMANDED – 04/01/2004

MOTION FOR REHEARING FILED:
MANDATE ISSUED:

EN BANC.

CARLSON, JUSTICE, FOR THE COURT:

This matter is on appeal after a ruling by the Circuit Court of the First Judicial District of Hinds County granting the Plaintiffs' Motion for Partial Summary Judgment and denying the Defendants' Motion for Summary Judgment. In essence, the trial court granted declaratory judgment finding that the plaintiffs had no obligation to arbitrate their disputes with the defendants, and the defendants thus filed this appeal. For the reasons stated below, we affirm the trial court's ruling.

FACTS AND PROCEEDINGS IN THE TRIAL COURT

Pursuant to Miss. Code Ann. §§ 83-49-1 et seq., National Pre-Paid Legal Services of Mississippi, Inc. ("National") offered contracts for legal expense insurance to individuals for a monthly fee. National is incorporated in Georgia and has its principal place of business in Ada,

Oklahoma. National, in turn, has contracted with Pre-Paid Legal Services, Inc. ("Pre-Paid"), an Oklahoma corporation, to provide administrative services for National. National is a subsidiary of Pre-Paid and has no employees.

In accordance with § 83-49-13 National has submitted two contracts and a Legal Shield Addendum which have been reviewed and approved by the Mississippi Insurance Commissioner. Both contracts are in a 9-point font size and contain the following provisions on the fifth page of the six page contract under the Subheading "General Provisions":

> E. **Specific Exclusions:** The following items are specifically excluded and shall not be interpreted as included benefits:
>
> . . .
>
> 2. Any person or entity who initiates or participates in a lawsuit against the Company or any of its affiliates, or is named as a defendant or respondent in a lawsuit initiated by the Company or any of its affiliates, shall be specifically excluded from receiving coverage under this Contract for services related to such lawsuit. All coverage under this Contract for services unrelated to a lawsuit either initiated by or against the Company or any of its affiliates, shall be suspended during the pendency of such lawsuit.
>
> F. **Attorney Client Contract:** All benefits provided under this Contract, except Title I benefits [Legal Consultation and Legal Assistance Services], shall be subject to the terms of an Attorney-Client Contract to be executed by the

> Covered Person prior to the time services are rendered, which contract may require payment of anticipated costs to the Provider Attorney to cover legal services not covered by this Contract. All determinations of anticipated costs shall be made in the sole discretion of the Provider Attorney, and eligibility for receipt of benefits hereunder is contingent upon payment of same prior to commencement of legal representation by Provider Attorney.
>
> G. **Provider Attorney:** Provider Attorney is defined as a law firm designated by the Company to provide the benefits described in this Contract.
>
> . . .
>
> K. **Settlement of Disputes:** In the event of a dispute, the parties will agree on an impartial attorney who will decide such dispute and that decision will be binding on all parties to such dispute.

Neither contract or addendum shield required a signature or acknowledgment from the person or persons purchasing the pre-paid legal expense agreement.

This action was brought in Hinds County Circuit Court by twenty-nine plaintiffs who entered into one or the other contracts with National. One plaintiff, Samuel Battle, also entered into an agreement with Pre-Paid Legal Services, Inc., to market the legal services contracts. This marketing agreement is not at issue in this appeal. Named as defendants in the Second Amended Complaint were Pre-Paid Legal Services, Inc. (Pre-Paid), Harlan [sic] C. Stonecipher, Brooks Werkheiser (collectively referred to as "the Pre-Paid defendants"), Dyre Law Firm, PLLC, and

Arnold D. Dyre (collectively referred to as "Dyre defendants"). When filing the Second Amended Complaint, the plaintiffs withdrew the breach of contract claim against National Pre-Paid of Mississippi, removed National as a defendant, and added a claim for declaratory judgment of no obligation to submit to arbitration. The Plaintiffs' Motion for Leave to File a Third Amended Complaint, adding one additional plaintiff has not yet been ruled upon by the trial court.

Harland Stonecipher is the founder and CEO of Pre-Paid, and a member of the Board of National. Stonecipher has a Motion to Dismiss for Lack of Personal Jurisdiction pending in the trial court. Brooks Werkheiser is the former Vice President of Pre-Paid. The Dyre defendants provided legal counseling to members in Mississippi. The Pre-Paid defendants admit that they are not parties to the contracts with National, but maintain they are entitled to enforce the arbitration clause of the contract.

Plaintiffs have asserted the following eight causes of action: (1) violation of Mississippi Deceptive Advertising Statute (§ 97-23-30) (Pre-Paid defendants only); (2) tort of deceit (or fraud) (Pre-Paid defendants only); (3) tort of civil conspiracy (all defendants); (4) tort of professional negligence (Dyre defendants only); (5) tort of negligent misrepresentation (all defendants); (6) breach of fiduciary duty (Dyre defendants only); (7) illegal payments to the Dyre defendants (all defendants); (8) fraudulent inducement of sales contract (Battle is the only plaintiff asserting this count against Pre-Paid defendants); and (9) declaratory judgment that their claims are not subject to arbitration (against all defendants). Thereafter, the defendants filed suit in the U.S. District Court alleging this matter posed a federal question under the Federal Arbitration Act and

that federal court is a more convenient forum. The defendants requested a stay in the state court action pending the outcome of the federal court action.

The circuit court refused to impose a stay and, instead, granted Plaintiffs' Motion for Partial Summary Judgment and denied defendants' Motion for Summary Judgment. Specifically, the trial court declared that the defendants are not in a position to require arbitration based on language in the National contract, that imposition of the arbitration language would destroy certain legal rights of the plaintiffs, and there is no binding language existing in the agreement between plaintiffs and National Prepaid.

STANDARD OF REVIEW

This Court reviews questions of law de novo. ***Russell v. Performance Toyota, Inc.,*** 826 So.2d 719, 721 (¶ 5) (Miss. 2002). The underlying case was presented to the trial court by way of summary judgment. This Court applies a de novo standard of review on appeal from a grant of summary judgment by the trial court. ***Rush v. Ivy,*** 853 So. 2d 1226, 1229 (¶ 12) (Miss. 2003) (citing ***Jenkins v. Ohio Cas. Ins. Co.,*** 794 So.2d 228, 232 (Miss. 2001); ***Russell v. Orr,*** 700 So.2d 619, 622 (Miss. 1997); ***Richmond v. Benchmark Constr. Corp.,*** 692 So.2d 60, 61 (Miss. 1997); ***Northern Elec. Co. v. Phillips,*** 660 So.2d 1278, 1281 (Miss. 1995)). Although we have not yet been confronted with a declaratory judgment finding against arbitration, we have reviewed the grant or denial of a motion to compel arbitration under the de novo standard of review. ***Tupelo Auto Sales, Ltd. v. Scott,*** 844 So.2d 1167, 1169 (¶ 5) (Miss. 2003) (citing ***East Ford, Inc.***

v. Taylor, 826 So.2d 709, 713 (Miss. 2002) and ***Webb v. Investacorp, Inc.***, 89 F.3d 252, 256 (5th Cir. 1996)).

DISCUSSION

Although the parties raise numerous issues on appeal, one issue is dispositive, and we thus need address only that issue.

I. WHETHER THERE WAS AN AGREEMENT TO ARBITRATE.

The critical issue before us today is whether the language contained in the pre-paid legal services plan constitutes a binding arbitration provision. The Pre-Paid defendants contend that the statute requires that legal expense plans contain an arbitration clause and that the contract contains a binding arbitration provision for any disputes that arise. In the Mississippi statute permitting pre-paid legal expense agreements, the Legislature has required that entities selling legal expense insurance contain "[a] statement describing a procedure for settling disputes between or among the sponsor, participating or staff attorneys, and the subscribers." Miss. Code Ann. § 83-49-13(2)(f). The Federal Arbitration Act provides that:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. This Court "will respect the right of an individual or an entity to agree in advance of a dispute to

arbitration or other alternative dispute resolution." ***Russell v. Performance Toyota, Inc.,*** 826 So.2d at 721-22 (¶ 6) (citing ***IP Timberlands Operating Co. v. Denmiss Corp.,*** 726 So.2d 96, 104 (¶ 29) (Miss. 1998)).

> In determining the validity of a motion to compel arbitration under the Federal Arbitration Act, courts generally conduct a two pronged inquiry. The first prong has two considerations: (1) whether there is a valid arbitration agreement and (2) whether the parties' dispute is within the scope of the arbitration agreement.
>
> . . .
>
> Under the second prong, the United States Supreme Court has stated the question is "whether legal constraints external to the parties' agreement foreclosed arbitration of those claims.

East Ford, Inc. v. Taylor, 826 So.2d at 713 (¶¶ 9-10) (citing ***Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.,*** 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)).

The provision in the pre-paid legal expense agreement provides as follows:

> K. **Settlement of Disputes:** In the event of a dispute, the parties will agree on an impartial attorney who will decide such dispute and that decision will be binding on all parties to such dispute.

This Court has not yet been faced with deciding whether such a statement is sufficient to evidence an agreement to settle disputes through arbitration. However, the U.S. District Court for the Northern District of Mississippi was faced with a remarkably similar situation to the one in the

present case. In an action concerning a life insurance policy, the plaintiff signed only the application. The insurer moved to compel binding arbitration that included "all disputes, claims, questions, and controversies of any kind or nature arising out of, or relating any way to, this policy, its subject matter, its negotiation, issuance, or termination" which was contained in the endorsement to the life insurance policy.

After setting forth the ***Mitsubishi*** standard, the district court held:

> Even with these instructions in mind, this court has no hesitation in finding that the parties never agreed to arbitration and that plaintiff did not waive her right to seek adjudication of her claims in court. The application was the only document plaintiff ever signed; there is, of course, no mention in its contents of the arbitration endorsement. That endorsement is part of the insurance contract which plaintiff received upon completion of the application process. When plaintiff received the policy, she was given the option of "return[ing] it for any reason," in which case, the policy was "void from the beginning. . . ." There was no notice, no discussion, and no negotiation of the arbitration endorsement, circumstances, which, in this court's view, hardly signify either agreement or waiver. The arbitration endorsement is therefore not enforceable, and this matter may proceed in this court.

McCreary v. Liberty Nat'l Life, 6 F. Supp. 2d 920, 920-21 (N.D. Miss. 1998). As in ***McCreary,*** the plaintiffs in the case sub judice signed only the application, which did not contain an arbitration provision.

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." ***AT & T Technologies, Inc. v. Communications Workers of America,*** 475 U.S. 643, 648, 106 S.Ct. 1415, 1418 (1986) (citing ***United Steelworkers v. Warrior & Gulf Navigation Co.,*** 363 U.S. 574, 582, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960), and ***United Steelworkers v. American Mfg. Co.,*** 363 U.S. 564, 570-71, 80 S.Ct. 1343, 1364-65, 4 L.Ed.2d 1403 (1960) (Brennan, J., concurring)). New Jersey courts require that an agreement must clearly foreclose any court remedies in order to be enforceable. "If the defendant wanted to enter into an agreement to bind plaintiff to arbitration under all circumstances, it should have written an inclusive arbitration clause." ***Quigley v. KPMG Meat Marwick, LLP,*** 330 N.J. Super. 252, 270-71, 749 A.2d 405, 415-16 (N.J. Super. Ct. App. Div. 2000).

Other states give the benefit of the doubt to favor arbitration, even where the party does not sign the agreement. ***Comvest, L.L.C. v. Corporate Secs. Group, Inc.,*** 507 S.E.2d 21 (Ga. Ct. App. 1998) (finding securities purchaser may be bound by agreement to arbitrate even in the absence of his signature); ***Solle v. Western States Ins. Agency, Inc.,*** 999 P.2d 328, 332 (¶ 23) (Mont. 2000) (holding that any doubts must be resolved in favor of arbitration).

In the case sub judice, we do not find a clear showing that the parties have agreed to arbitration. In so doing, we must balance the intent of the parties with the constitutional right to a trial by jury. Miss. Const. art. 3, § 31. We are persuaded by the district court's reasoning in ***McCreary***. Just as in ***McCreary,*** here there was no notice, no discussion, and no negotiation of the arbitration

agreement. Further, based upon the language in this clause, we do not find that an average citizen would realize that he or she is giving up his or her right to a trial by jury under the broad, general language contained in the pre-paid legal expense agreement.

Additionally, the purported arbitration provision is contradicted because the contract also contemplates a lawsuit being filed by either National or the plaintiffs. Both contracts contain the following provision:

> E. **Specific Exclusions:** The following items are specifically excluded and shall not be interpreted as included benefits:
>
> . . .
>
> 2. *Any person or entity who initiates or participates in a lawsuit against the Company or any of its affiliates, or is named as a defendant or respondent in a lawsuit initiated by the Company or any of its affiliates,* shall be specifically excluded from receiving coverage under this Contract for services related to such lawsuit. All coverage under this Contract for services unrelated to a lawsuit either initiated by or against the Company or any of its affiliates, shall be suspended during the pendency of such lawsuit.

(emphasis added).

Based upon the foregoing, we find that there was not a valid, binding arbitration agreement contained in the pre-paid legal expense agreement. Therefore, the trial court did not err in granting the Plaintiffs' Motion for Partial Summary Judgment and denying the Defendants' Motion for Summary Judgment.

CONCLUSION

Based on the prior decisions of this Court, there can be no doubt that when addressing arbitration issues, we have readily acknowledged that there is a strong federal policy favoring arbitration. ***Russell v. Performance Toyota, Inc.,*** 826 So.2d 719 (Miss. 2002); ***East Ford, Inc. v. Taylor,*** 826 So.2d 709 (Miss. 2002); ***IP Timberlands Operating Co. v. Denmiss Corp.,*** 726 So.2d 96 (Miss. 1998). However, for the foregoing reasons, we affirm the trial court's grant of partial summary judgment and declaratory judgment finding that the plaintiffs' claims are not subject to arbitration, and we remand this case to the trial court for further proceedings consistent with this opinion.

AFFIRMED AND REMANDED.

SMITH, C.J., WALLER, P.J., EASLEY, GRAVES AND DICKINSON, JJ., CONCUR. COBB, P.J., DISSENTS WITHOUT SEPARATE WRITTEN OPINION. DIAZ, J., NOT PARTICIPATING.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

SAMUEL BATTLE, ET AL. — PLAINTIFFS

VS

CIVIL ACTION NO. 251-02-270

PREPAID LEGAL SERVICES, INC., ET AL — DEFENDANTS

ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This cause came on for hearing on Plaintiffs' Motion for Partial Summary Judgment, on the ground that Plaintiffs have no obligation to arbitrate in this action since there is no such requirement in their contract with Prepaid Legal Services, Inc. ("Prepaid"). Adversely, the court is asked to grant Defendants Brooks Werkheiser and Prepaid Legal Services, Inc.'s Motion for Summary Judgment, on the ground that a National Prepaid Legal Services Inc. ("National Prepaid") contract vicariously imposes mandatory arbitration upon Plaintiffs, even though no arbitration language is included in Plaintiffs' contract with Prepaid. Having reviewed the submissions of the parties, heard oral arguments and being otherwise fully advised in the premises, the court finds and orders as follows:

FACTS

This is a bad faith insurance action wherein Plaintiffs complain that the Defendant, through fraud and misrepresentation caused them to purchase a prepaid legal service contract from Prepaid. Prepaid is an affiliate of

National Prepaid. In the agreement between Plaintiffs and Prepaid, there is no arbitration agreement of any kind. However, Defendants contend that the arbitration agreement in its affiliate National Prepaid contract vicariously imposes a duty to arbitrate on the Plaintiffs. National Prepaid is a nonparty to the agreement between Plaintiffs and Prepaid. Moreover, there is no written agreement to arbitrate that has been discussed or otherwise acknowledged by signatures of the Plaintiffs.

After this action was filed in the state court, Defendants filed suit in Mississippi's federal court alleging that a federal question regarding the Federal Arbitration Act ("FAA") was at issue, and that the federal court provided more convenience to the Defendants. If the federal court decided the FAA issues, the Defendants claimed that other suits in our state courts would be bound by the federal ruling. This court is of the opinion that the issue of the enforceability of the arbitration issue is one for state court, not just the federal courts. As such, the court finds no meritorious arguments by the Defendants to convince the court's to impose a stay in order for the federal court to rule first. This is especially so, since there is no finding of an agreement between Plaintiffs and Prepaid which actually includes an enforceable arbitration clause under the Federal Arbitration Act ("FAA").

In this case there is no written arbitration agreement between Plaintiffs and National Prepaid. Moreover, Mississippi statutes do not require prepaid legal service contracts to specifically require arbitration as an alternative dispute resolution. Under Section 11-15-1, Miss. Code Ann. (1972) arbitration is permissible, not mandatory. Section 83-49-13(2)(f), Miss. Code Ann. (1972) only requires that the prepaid legal contract contain "a statement

describing a procedure for settling disputes between and among the sponsor . . . and the subscribers." There is no requirement that arbitration be the exclusive method of resolving disputes.

Additionally, there is no proof that the agreement between Plaintiffs and Prepaid automatically transposed the arbitration language from the National Prepaid contract to the Prepaid agreement, by reference or otherwise. Consequently, Plaintiffs have not knowingly waived any of their rights under the Prepaid contract, to include but not limited to, a waiver of their right to a jury trial.

LAW

The construction of the contract between Plaintiffs and Prepaid raises questions of law to be decided by the court. ***Parkerson vs Smith***, 817 So.2d 513 (Miss. 2002). In order for the Defendants to prevail in their arguments supporting the imposition of the arbitration clause, the arbitration clause must be in writing, signed or acknowledged by the Plaintiffs and National Prepaid, be reasonable and not unconscionable, not be fraudulent, deceptive nor be a misrepresentation of the contract provisions. ***Parkerson, supra***. An agreement to arbitrate is a waiver of valuable rights that are personal to both parties. It is therefore extremely important that an arbitration clause be in writing and signed by the party invoking it. ***Rojas vs TIK Communications, Inc.***, 87 F.3d 745, 748 (5th Circuit 1996). Consequently, arbitration cannot be required in a matter involving an attempt by a nonsignatory to enforce such an agreement. ***Grigson vs Creative Artists Agency***, 210 F.3d 524, 528 (5th Circuit 2000).

CONCLUSION

Applying the law to the aforestated circumstances, the court is of the opinion that the Plaintiffs' Motion for Partial Summary Judgment should be granted, and the Motion of Defendants Brooks Werkheiser and Prepaid Legal Services, Inc. should be denied. The defendants are not in a position to require arbitration in its agreement with Plaintiffs, based on alternative dispute resolution language included in a National Prepaid contract. Because, certain legal rights of the Plaintiffs would be destroyed by imposition of the National Prepaid arbitration language into the Prepaid agreement, the court is not inclined to hold that the arbitration language in National Prepaid's contract, without the Plaintiffs' consent or knowledge is enforceable. This is especially so, since there is no such binding language that actually exists in the contracts between Plaintiffs and Prepaid.

IT IS THEREFORE ORDERED AND ADJUDGED hat Defendants Brooks Werkheister [sic] and Prepaid Legal Services, Inc. Motion for Summary Judgment is hereby denied.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs Motion for Partial Summary Judgment is hereby granted.

SO ORDERED AND ADJUDGED this the 19th day of August 2002.

/s/ Tomie T. Green
CIRCUIT JUDGE

Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
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June 3, 2004

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 3rd day of June, 2004.

Supreme Court Case # 2002-CA-01669-SCT
Trial Court Case # 251-02-270 CIV

Pre-Paid Legal Services, Inc., Brooks Werkheiser, Dyre Law Firm, PLLC and Arnold D. Dyre v. Samuel Battle, Reginald Burks, Myrtis Hollis, James Robinson, Bennie Irvin, Mary Keeler, Willie McKenny, Renata L. Miller, David Mills, Eric Norwood, Geneva Shelby, Shemekia Shelby, Pastella Spratley, George Williams, Leonard Boddie, John C. Burwell, Angela Hudnall, Minnie Mosely, Caroline Smith, Thelma Louise Smith, Jimmy Grant, Sylvia Grant, Tony Barfield, Mary Honeysuckle, Lonedell Nicholson, Patricia Whitfield, Charles Alexander, Kenneth M. Crook and Beverly Thompson

Appellants' motion for rehearing is denied. Cobb, P.J., would grant. Diaz, J., not participating.

**NOTICE TO CHANCERY/*
*CIRCUIT/COUNTY COURT CLERKS**

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

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(2)

No. 04-305

Supreme Court, U.S.
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In The
Supreme Court of the United States

PRE-PAID LEGAL SERVICES, INC., et al.,

Petitioners,

v.

SAMUEL BATTLE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Mississippi

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Mississippi Supreme Court's ruling that the parties did not agree to arbitrate the claims asserted by Respondents below violates the Federal Arbitration Act by impermissibly discriminating against a purported arbitration clause.

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OPINION BELOW

The Petition states that the opinion of the Mississippi Supreme Court to which they seek certiorari had not been released for publication in an official reporter at the time the Petition was filed. The opinion is reported at 873 So.2d 79 (Miss. 2004).

JURISDICTION

The issues presented to and resolved by the Mississippi Supreme Court do not create a conflict between the Mississippi Supreme Court and another state court or a United States court of appeals within the meaning of Sup. Ct. Rule 10(b). Additionally, the Mississippi Supreme Court has not decided an important question of federal law or a federal question within the meaning of Sup. Ct. Rule 10(c). Instead, the Petition seeks review of the Mississippi Supreme Court's determination of an issue of state law that conflicts with no identified federal decision.

STATEMENT OF THE CASE

Respondents adopt the procedural history of this matter as set forth in the Petition. Respondents do not adopt any argument contained in the Statement of the Case.

REASONS FOR DENYING THE PETITION

A. The Mississippi Supreme Court's Ruling That Respondents Did Not Agree to Arbitrate Their Claims Against Petitioner Does Not Discriminate Against the Federal Arbitration Act.

In its decision below, the Mississippi Supreme Court found that there was not an agreement to arbitrate the claims Respondents have brought against Petitioners in Mississippi state court. Petitioners seek certiorari on grounds that the Mississippi Supreme Court's ruling violates the Federal Arbitration Act ("FAA"). Petitioners base this contention on arguments that the Mississippi Supreme Court has imposed "unique" requirements on arbitration clauses that serve to erect discriminatory barriers to their enforcement. *Petition*, p. 7.

In their request for certiorari, Petitioners set forth a disagreement with the Mississippi Supreme Court's ruling below. Petitioners do not, however, provide this Court with any evidence of discrimination against arbitration. Because Petitioners have not and cannot provide this Court with any evidence to support the contention that the Mississippi Supreme Court has done anything other than apply standard contract interpretation principles to the arbitration issue presented in this case, the request for the writ should be denied.

1. Petitioners have not provided the Court with evidence of discrimination against the FAA.

Petitioners allege that the Mississippi Supreme Court's decision below reflects "continued animosity toward arbitration clauses." *Petition*, p. 7. Petitioners further allege that the Mississippi Supreme Court imposed a "notice

requirement" and a "signature requirement" on arbitration clauses, and that it "refused to apply rules which apply to the construction of contracts generally" in violation of this Court's decisions in *Southland Corp. v. Keating*, 465 U.S. 1 (1984) and *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996).

The Petition is devoid of any evidence to support these naked assertions. Unlike the state court decisions overturned in *Keating* and *Casarotto*, the Mississippi Supreme Court's decision below does not interpret a state statute as precluding arbitration. Instead, the court found that the parties did not enter into an agreement to arbitrate. Petitioners do not dispute that the Mississippi Supreme Court was empowered to make a finding of whether the parties have entered into an agreement to arbitrate pursuant to Mississippi law. *See Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 429 (5th Cir. 2004) (holding that the question of "whether there is a valid agreement to arbitrate between the parties" is "decided according to state law"); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

Petitioners base their allegation that the Mississippi Supreme Court has impermissibly discriminated against the FAA in part on the argument that the court imposed a "notice requirement" and a "signature requirement" on arbitration clauses. *Petition*, pp. 8, 10. A review of the court's opinion, however, provides no support for this contention. In fact, the only reference to "notice" in the opinion is a block quotation of the Northern District Court of Mississippi's opinion in *McCreary v. Liberty Nat'l Life*, 6 F.Supp.2d 920, 920-21 (N.D. Miss. 1998).

In *McCreary*, the federal district court found "[t]here was no notice, no discussion, and no negotiation of the arbitration endorsement, circumstances, which, in this court's view, hardly signify either agreement or waiver." *Id.* The Mississippi Supreme Court then concluded that, as in *McCreary*, the absence of notice was a factor supporting its conclusion that the parties did not enter into an arbitration agreement. *Pre-Paid Legal Services, Inc. v. Battle*, 873 So.2d 79, 84 (Miss. 2004). The court did not hold that notice was a prerequisite to the enforcement of an arbitration clause; it simply concluded that the absence of notice supported its determination that the parties never entered into an arbitration agreement.

Similarly, the court specifically based its finding that the absence of a signed arbitration clause supported its conclusion that the parties did not enter into an arbitration agreement in the *McCreary* decision. *Battle*, 873 So.2d at 83 ("As in *McCreary*, the plaintiffs in the case *sub judice* signed only the application, which did not contain an arbitration provision.") The court did not hold that a signature was required in order for an arbitration agreement to be enforceable; instead, it concluded that the absence of a signed arbitration agreement – together with the absence of notice or discussion and the broad, general language on which Petitioners rely – supported its determination that the parties never entered into an arbitration agreement.

The determination of whether there has been the requisite "meeting of the minds" for the formation of a legal agreement is one that state courts have long made. The Mississippi Supreme Court's determination below was based on an examination of the circumstances surrounding the purported agreement and the conduct of the

parties. Although Petitioners cavalierly represent that the Mississippi Supreme Court's opinion below discriminates against arbitration agreements in violation of the FAA, they provide absolutely no evidence in support of this representation. The Petition is devoid of any precedent from the Mississippi Supreme Court in which the legal principles of notice and negotiation are applied inconsistently with its holding in *Battle* below.

Moreover, the Petition fails to provide this Court with any precedent in which the Mississippi Supreme Court's consideration of whether parties had entered into an agreement was undertaken in a manner different from that below. The *Battle* opinion does not depart from the Mississippi courts' determination of whether there has been a "meeting of the minds" sufficient to recognize a legal agreement. *See In re Estate of Davis*, 832 So.2d 534, 536 (Miss. Ct. App. 2001) ("Consideration and a *meeting of the minds* between competent contracting parties are the essential elements of a valid, binding agreement.") As in the *Turney* opinion ironically cited by Petitioners, the Court considered the issue of a signature *vel non* as a factor in its consideration of whether the parties entered into an agreement – not as itself determining the existence of an agreement. *Turney v. Marion County Bd. of Educ.*, 481 So.2d 770, 774 (Miss. 1985) ("The object of a signature is to show mutuality or assent, but these facts may be shown in other ways, as, for example, by the acts or conduct of the parties."); *Battle*, 873 So.2d at 84 ("Just as in *McCreary*, here there was no notice, no discussion, and no negotiation of the arbitration agreement."). Thus the *Battle* court's examination of the circumstances surrounding the purported agreement is wholly consistent with the *Turney* opinion.

Finally, perhaps the best evidence that the Mississippi Supreme Court has not discriminated against the FAA is the court's reliance upon the *McCreary* decision. The *Battle* opinion below explicitly relies upon the federal district court's reasoning in *McCreary*. The Petition completely ignores the fact that the Mississippi Supreme Court found support for its decision in a federal court decision – *McCreary* is not even cited in the Petition. Contrary to Petitioners allegation that the court has shown "animosity" toward the FAA, the opinion below is grounded firmly in reasoning adopted from a federal opinion. The notion that the Mississippi Supreme Court's reliance on a federal decision can be characterized as discrimination against a federal statute is both groundless and nonsensical.

2. Petitioners cannot establish discrimination based on the absence of precedent addressing the specific facts below.

The Fifth Circuit Court of Appeals recently rejected the "arbitration discrimination" argument advanced by Petitioners. In *Banc One Acceptance Corp. v. Hill*, the Fifth Circuit reviewed the district court's denial of Banc One's motion to compel arbitration pursuant to Mississippi law of unconscionability as it was recently articulated by the Mississippi Supreme Court in *East Ford, Inc. v. Taylor*, 826 So.2d 709, 717 (Miss. 2002), 367 F.3d 426 (5th Cir. 2004). On appeal Banc One, relying on *Casarotto* as Petitioners do herein, argued that *Taylor* impermissibly discriminates against arbitration agreements. *Hill*, 367 F.3d at 432.

In an opinion by Judge Jones, the Fifth Circuit rejected Banc One's argument that the *Taylor* decision

discriminated against arbitration agreements because it "set out its particular approach to unconscionability in the context of an arbitration dispute." *Id.* The court held that were it to accept Banc One's argument, "a state court would find it extremely difficult to craft a decision holding an arbitration provision unconscionable under state law because, by setting out a particular approach to unconscionability in the context of an arbitration case, the state court would be impermissibly discriminating against arbitration under the FAA." *Id.*

Petitioners urge the Court to find discrimination based on the same argument rejected in *Hill*. The petition does nothing more than argue that in the absence of precedent outside the arbitration context in which the Mississippi Supreme Court reached the same decision as below, this Court should infer discrimination against the FAA. *Hill* refused to infer discrimination based on the absence of such precedent:

> It is important to note here that if the Mississippi courts were to limit the applicability of the procedural unconscionability approach outlined in *Taylor* to arbitration agreements only, or were repeatedly to apply a different approach to other contractual provisions, the issue of discrimination against arbitration under the FAA may come into play. However, absent any compelling evidence of such an approach, and given that *Taylor* was decided relatively recently, we decline to find improper discrimination here.

Hill, 367 F.3d at 432, n. 3. The Court should similarly decline to impute a discriminatory motive or find a discriminatory effect simply because the Mississippi courts

have not yet had occasion to address the factual scenario below outside the arbitration context.

3. The Mississippi Supreme Court's finding that the purported arbitration provision is contradicted by other language in the purported agreement provides an alternative basis for the court's decision.

In finding that the parties did not agree to arbitration, the court noted an additional basis for affirming the trial court's summary judgment in favor of Plaintiffs/Respondents:

> [T]he purported arbitration provision is contradicted because the contract also contemplates a lawsuit being filed by either National or the plaintiffs. Both contracts contain the following provision:
>
> > * * *
> >
> > 2. Any person or entity who initiates or participates in a lawsuit against the Company or any of its affiliates, or is named as a defendant or respondent in a lawsuit initiated by the Company or any of its affiliates, shall be specifically excluded from receiving coverage under this Contract for services related to such lawsuit. . . .

Battle, 873 So.2d at 84. Because of the ambiguity caused by the agreement's purported arbitration provision and its contemplation of a lawsuit being filed by National Pre-Paid or the plaintiffs, the court concluded that the parties had not entered into a valid, binding arbitration agreement.

This determination by the Mississippi Supreme Court is consistent with other courts' analyses of such ambiguities. *See Heye v. American Golf Corp., Inc.*, 80 P.3d 495, 500 (N.M. Ct. App. 2003) ("We conclude that the conflicting terms of the arbitration agreement render it ambiguous."); *Owner-Operator Indep. Drivers Assoc. v. C. R. England, Inc.*, 325 F.Supp.2d 1252, 1259 (D. Utah 2004) (limiting scope of arbitration clause that was contradicted by provisions allowing for resolution of many disputes outside of arbitration).

CONCLUSION

Petitioners fail to provide any support for their contention that the Mississippi Supreme Court has discriminated against the Federal Arbitration Act. The Petition offers nothing more than a disagreement with the court's determination that the parties failed to enter into an agreement to arbitrate the claims brought by Respondents. Petitioners effectively seek to reargue the appeal decided against them in state court on a question of state law, without evidence of a conflict between the Mississippi Supreme Court and the Circuit Courts, or of a conflict between the Mississippi Supreme Court and any federal statute. Because they offer no evidence in support of their contention that the Mississippi Supreme Court's decision is inconsistent with its consideration of contract formation questions generally, Petitioners fail to establish discrimination.

FOR THESE REASONS, the Petition should be denied.

Respectfully submitted,

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